92-973

Supreme Court, U.S.
FILED
DEC 7 1992
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARRIS COUNTY APPRAISAL DISTRICT AND APPRAISAL REVIEW BOARD FOR THE HARRIS COUNTY APPRAISAL DISTRICT ,
Petitioners,

v.

TRANSAMERICA CONTAINER LEASING INC.,
Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Foreign Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, precludes state and local ad valorem property taxation of domestically owned instrumentalities of commerce (shipping containers) used exclusively in foreign commerce, a question not decided by the Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 444 n.7(1979)

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NO. _____

IN THE

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HARRIS COUNTY APPRAISAL DISTRICT AND APPRAISAL REVIEW BOARD FOR THE HARRIS COUNTY APPRAISAL DISTRICT,

Petitioners,

v.

TRANSAMERICA CONTAINER LEASING INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Petitioners, Harris County Appraisal Review Board for the Harris County Appraisal District, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the First District of Texas, entered in the above-entitled proceeding on September 26, 1991.

OPINION BELOW

The opinion of the Court of Appeals for the First District of Texas is reported at 821 S.W.2d 637 and is reprinted in the appendix. See p.1a, *infra*.

The judgment of the 80th District Court of Harris County, Texas, has not been reported. The trial court's judgment and findings of fact and conclusions of law are reprinted in the appendix. See p. 11a, *infra*.

JURISDICTION

The Court of Appeals for the First District of Texas entered its judgment of September 26, 1991, affirming the judgment entered on June 4, 1990, by the 80th District Court of Harris County, Texas, in favor of respondent and against petitioners. See p. 10a, *infra*. On January 9, 1992, the court of appeals overruled petitioners' timely motion for rehearing. See pp. 25a-27a, *infra*.

Thereafter, on June 24, 1992, the Supreme Court of Texas denied petitioners' application for writ of error. See pp. 28a-30a, *infra*. On September 9, 1992, the court overruled petitioners timely motion for rehearing. See pp. 31a-33a, *infra*.

Petitioners invoke the jurisdiction of this Court to review the judgment of the Court of Appeals for the First District of Texas under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article I, § 8, cl. 3.

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

STATEMENT OF THE CASE

This is an ad valorem property tax case in which the court below held that the Foreign Commerce Clause precludes taxation of domestically owned shipping containers used exclusively in foreign commerce because they are at substantial risk of international multiple taxation.

Petitioner, Harris County Appraisal District, is a political subdivision of the State of Texas responsible for appraising property within its boundaries for ad valorem tax purposes. TEX TAX CODE ANN. § 6.01 (Vernon 1992). The Harris County Appraisal District does not itself, levy property taxes. Rather, it furnishes appraisal rolls listing taxable property and appraised values to units of government within its boundaries which impose ad valorem property taxes. Petitioner, Appraisal Review Board for the Harris County Appraisal District, is a separate legal entity whose responsibilities include determination of property owner protests. TEX. TAX CODE ANN. §§ 6.41, 41.41(Vernon 1992). Respondent, Transamerica Container Leasing Inc., is a corporation organized and existing under the laws of, and having its principal place of business in, the State of New York. See p. 15a, *infra*. This petition refers to petitioner, Harris County Appraisal District, as "district," to petitioner, Appraisal Review Board for the Harris County Appraisal District, as "board," and to respondent as "Transamerica."

The Texas Constitution provides that "[A]ll real property and tangible personal property in this State ... shall be taxed in proportion to its value. "TEX CONST. art. 8. § 1(b). The district determined that certain shipping containers owned by Transamerica and temporarily present within the district's boundaries on January 1, 1987, were subject to ad valorem property taxation for the year 1987. Transamerica protested the inclusion of its shipping containers on the district's appraisal rolls to the board under TEX. TAX CODE ANN. §§ 41.41 *et seq.* (Vernon 1992). The Board upheld the district's determination. Transamerica duly appealed the board's order determining its protest to the 80th District Court of Harris County, Texas, under TEX. TAX CODE ANN. §§ 42.01 *et seq.* (Vernon 1992). See pp. 34a-35a, *infra*.

In its protest before the board and in its appeal to the trial court, Transamerica argued that because its shipping containers are instrumentalities of foreign commerce and are used exclusively in foreign commerce, their taxation by the State of Texas and its political subdivisions violated the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution, and the Due Course of Law, Equal Protection, and Equal and Uniform Taxation Clauses of the Texas Constitution. See p. 35a, *infra*. The trial court ruled in Transamerica's favor on each of its arguments and, accordingly, struck down the tax. See pp. 11a, 17a-24a, *infra*. The parties submitted the case to the trial court on an agreed stipulation of facts. See p. 34a, *infra*. The trial court's findings of fact are virtually identical to the stipulation of the parties. See pp. 14a-17a, *infra*.

Transamerica's shipping containers which district attempted to subject to property taxes were used exclusively in foreign commerce. They were temporarily present within the district's boundaries on January 1, 1987, the Texas lien

date. Shipping containers owned by Transamerica, however, are frequently present in the district. See p. 16a, *infra*.

Transamerica leases its shipping containers to shipping companies which use them to ship goods all over the world. Because they could be taxed in a number of countries, Transamerica's containers are at risk of international multiple taxation. The district, board, and the State of Texas do not provide any mechanism to ensure that Transamerica's containers will not be subjected to international multiple taxation. Transamerica did not contend, and the record does not reflect, that any other country taxed its shipping containers. See p. 16a. *infra*. In accordance with its policy, the district deleted foreign-owned shipping containers from the tax rolls. See pp. 16a-17a, *infra*.

The trial court concluded that taxation of Transamerica's shipping containers failed to satisfy the requirements established by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). In *Complete Auto Transit*, the Court established a four-part test for determining the validity of a tax under the Commerce Clause. First, the tax must be applied to an activity with a substantial nexus to the taxing state. Second, the tax must be fairly apportioned. Third, the tax must not discriminate against interstate commerce. Fourth, the tax must be fairly related to services provided by the taxing state. *Complete Auto Transit*, 430 U.S. at 279. In *Japan Line*, the Court held that a state tax on instrumentalities of foreign commerce requires a more elaborate inquiry, and imposed two additional requirements. First, the tax must not create a substantial risk of international multiple taxation. Second, the tax must not prevent the Federal Government from speaking with one voice in regulating international commercial relations. *Japan*

Line, 441 U.S. at 451.

Transamerica did not contend, and the trial court did not find, that its shipping containers did not have a substantial nexus with the State of Texas or that the tax was not fairly apportioned. See p. 37a, *infra*. Texas law requires apportionment. TEX TAX CODE ANN. § 21.03(a) (Vernon 1992). Further, the record does not reflect that the containers physically present within the district on January 1, 1987, were not fairly representative of the average presence of Transamerica's containers during 1987. See *Japan Line*, 441 U.S. at 437.

The trial court concluded, however, that the tax conflicted with the third and fourth prongs of the *Complete Auto* test. According to the trial court, taxation of Transamerica's containers discriminated against and unduly burdened interstate commerce by giving an unfair competitive advantage to foreign owners whose containers were not taxed. See p. 20a, *infra*. Further, the trial court found that the tax was not fairly related to governmental services provided because the value of any benefits received during the containers' temporary presence in Texas was minimal and not reasonably related to the amount of tax imposed. See p. 19a, *infra*.

The trial court further concluded that the tax failed the first additional requirement established by *Japan Line*: "(1) the tax, notwithstanding apportionment, must not create a *substantial* risk of international multiple taxation." See p. 18a, *infra* (emphasis added). Neither the parties, in their agreed stipulation of facts, nor the trial court, in its findings of fact and conclusions of law, quantified the degree of risk of multiple taxation to which Transamerica's containers were exposed. See pp. 16a,36a, *infra* The trial court simply

stated "[T]he taxation of domestically owned shipping containers used exclusively in foreign commerce creates a *risk* of international multiple taxation and, thus, fails to satisfy the requirements of *Japan Line*." See p. 18a, *infra* (emphasis added). No contention or finding was made that the tax impaired the Federal Government's ability to speak with one voice in regulating international commercial affairs, and the second *Japan Line* requirement was not an issue.

The trial court held that the tax violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clause of the Texas Constitution because the tax was not rationally related to services provided by the State of Texas. U.S. CONST. amend. XIV, § 1; TEX. CONST. art 1. § 19. See p. 21a-22a, *infra*. The Due Course of Law Clause of the Texas Constitution provides "[N]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. 1, § 19. It has been held to have the same meaning as the Due Process Clause of the Fourteenth Amendment. See p. 21a, *infra*, and authorities cited.

Finally, the trial court held that the tax violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Protection and Equal and Uniform Taxation Clauses of the Texas Constitution. U.S. CONST. amend. XIV, § 1; TEX. CONST. art. 1, § 3; TEX. CONST. art. 8, § 1(a). The different treatment accorded foreign-owned shipping containers, by exempting them from the tax, was arbitrary and denied Transamerica equal protection of the laws. See pp. 22a-24a, *infra*. The Texas Equal Protection Clause provides, in part, that "[A]ll free men ... have equal rights." TEX. CONST. art. 1, § 3. The Texas Equal and Uniform

Taxation Clause provides that "[T]axation shall be equal and uniform." TEX. CONST. art. 8, § 1(a). The Texas constitutional provisions have the same meaning as the Fourteenth Amendment's Equal Protection Clause. See p. 22a, *infra*, and authorities cited.

On appeal, the court of appeals affirmed the trial court's judgment, holding that the tax violated the *Japan Line* test and, therefore, was unconstitutional under the Commerce Clause. Because of its holding, the court of appeals did not decide the validity of the tax under the *Complete Auto* test or under the Due Process and Equal Protection Clauses of the Fourteenth Amendment or their parallel Texas constitutional provisions. See p. 8a, *infra*. The court of appeals did not base its decision on any adequate and independent state law ground.

The court of appeals reasoned that a tax on domestically owned instrumentalities of commerce that creates a "*substantial* risk of international multiple taxation" violates the Commerce Clause under this Court's holding in *Japan Line*. See p. 5a, *infra* (emphasis added). The magnitude of the risk of international multiple taxation is a question of fact. See p. 6a, *infra*. In their agreed stipulation of facts, the parties agreed only that Transamerica's containers were at risk of multiple taxation, not that the risk was "substantial." See p. 36a, *infra*. Nor did the trial court find as a fact that the risk was "substantial." See p. 16a, *infra*.

The court of appeals, nevertheless, held that the trial court by implication found the risk of international multiple taxation to be "substantial or enhanced." Otherwise, the trial court could not have found the tax to be prohibited under the *Japan Line* test. See p. 7a, *infra*. The court of appeals found support for the trial court's implied finding of substantial risk from its findings that other countries could

tax the containers and that Texas provided no mechanism to ensure that multiple taxation would not result. See p. 7a, *infra*.

District and board sought discretionary review of the court of appeals decision by the Supreme Court of Texas. See p. 29a, *infra*. On June 24, 1992, the Supreme Court of Texas denied petitioners' application for writ of error and, on September 9, 1992, overruled petitioners' motion for rehearing. See pp. 28a, 31a, *infra*. The question presented was raised first by Transamerica in the trial court. See p. 35a, *infra*. District and board raised the question on appeal in the court of appeals and in their motion for rehearing in that court. See pp. 4a, 27a, *infra*. Petitioners further raised the question in their application for writ of error in the Supreme Court of Texas and in their motion for rehearing from the court's denial of their application. See pp. 30a, 33a, *infra*.

REASONS FOR GRANTING THE WRIT

The court below incorrectly decided an important constitutional question not previously decided by this Court: does the Foreign Commerce Clause, U.S. CONST. art. I, § 8, cl.3, preclude state and local ad valorem property taxation of domestically owned instrumentalities of commerce used exclusively in foreign commerce? Because it created, according to the court of appeals, a substantial risk of international multiple taxation, the tax failed the test of Foreign Commerce Clause validity established by *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). This Court did not, however, fashion the bright line rule which the court of appeals applied in this case. *Japan Line*, 441 U.S. at 444 n.7 ("[A]ccordingly, we do not reach questions as to the taxability... of domestically owned instrumentalities engaged in foreign commerce.")

The question before this Court in *Japan Line* was a narrow one: "whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State." *Japan Line*, 441 U.S. at 444. While similar in some ways, this case differs from *Japan Line* in at least three significant respects.

First, the tax at issue here falls on instrumentalities of commerce owned by a domestic corporation whose principal place of business is in the United States. This Court specifically declined to decide the validity of state property taxation of domestically owned instrumentalities of foreign commerce. *Japan Line*, 441 U.S. at 444 n.7; *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 188-89 (1983).

Second, the California tax invalidated by the Court in *Japan Line* produced international multiple taxation. Because multiple taxation existed in fact, the Court declined to decide the circumstances under which the "mere *risk*" of international multiple taxation would invalidate a tax. *Japan Line*, 441 U.S. at 452 n. 17. In its brief in *Japan Line*, Sea Land Services,Inc., fearing retaliatory taxes abroad, stated that if the California tax were upheld "the United States would be the only nation in which property taxes would be levied upon foreign-owned instrumentalities used exclusively in foreign commerce." Brief of Sea Land Services, Inc. as *Amicus Curiae* at 2, *Japan Line*, 441 U.S. 434 (1979). The Solicitor General advised the Court that the Department of State, after inquiry, determined that only Afghanistan imposed property taxes on American instrumentalities of commerce entering its jurisdiction. Brief of the United States as *Amicus Curiae* at 15, *Japan Line*, 441 U.S. 434 (1979). In this case, there is no contention or finding that any other

country taxes Transamerica's shipping containers. There is only the implied finding that the containers are at substantial risk of international multiple taxation.

Third, *Japan Line's* proscription of multiple taxation is not absolute. *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 189 (1983). Japan's taxation of the shipping containers was consistent with an accepted international custom under which the country of domicile may tax the full value of property located abroad. *Japan Line*, 441 U.S. at 447. California could have avoided multiple taxation, as do petitioners here, simply by not taxing foreign-owned containers. *Container Corporation of America*, 463 U.S. 190-91. Requiring California to refrain from taxing such containers was consistent with both international practice and "express federal policy." *Id.*;*Japan Line*, 441 U.S. at 452-53. In the instant case, international custom and federal policy do not bar taxation of Transamerica's containers by the State of Texas and its political subdivisions. Rather, the same international custom which permitted Japan to tax its domicilaries' instrumentalities of commerce applies with equal force in support of the tax at issue here.

This case is similar in some respects to a case presently pending in this Court. *Itel Containers International Corporation v. Cardwell*, 814 S.W. 2d 29 (Tenn.1991), *cert. granted sub nom. Itel Containers International Corporation v. Huddleston*, 112 S.Ct. 1158 (1992)(No. 91-321). *Itel* involves a Tennessee sales tax imposed on shipping container leases. Because of the differences between sales and property taxes and because of the other issues involved (Import-Export Clause and federal preemption), this Court's decision in *Itel* may not be dispositive of the issue here presented.

This Court should resolve the question presented. It is important to the State of Texas and its local governmental units because the lower court's decision will result in a shift to other property owners of that portion of the tax burden that should be borne by domestic owners of shipping containers and other instrumentalities of foreign commerce, including aircraft, vessels, railroad rolling stock, trucks, and buses. The issue is important not only to the State of Texas. Although other states may be unlikely to follow the decision of a Texas intermediate appellate court, domestic owners of shipping containers and other instrumentalities of commerce are likely to continue their challenges to similar taxes, seeking to avoid their fair share of the cost of essential governmental services.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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December 7, 1992

APPENDIX

Judgment affirmed and Opinion filed September 26, 1991

In The

Court of Appeals

For The

First District of Texas

NO. 01-90-00678-CV

HARRIS COUNTY APPRAISAL DISTRICT AND APPRAISAL REVIEW BOARD FOR THE HARRIS COUNTY APPRAISAL DISTRICT, Appellants

V.

TRANSAMERICA CONTAINER LEASING INC., Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 89-12817

OPINION

This is an appeal from an ad valorem property tax case decided under Chapter 2 of the Texas Tax Code[1], in which appellee, Transamerica Container Leasing Inc. (Transamerica), originally appealed an adverse order from the Appraisal Review Board (the Board) for the Harris County Appraisal District (the District), to the 80th District Court. This order determined that shipping containers owned by Transamerica were taxable in Texas for the tax year of 1987. Transamerica's appeal to the district court was based solely on constitutional grounds, conceding the taxation was in all other respects valid. The Trial court found in Transamerica's favor, holding the tax unconstitutional. We affirm.

The parties submitted the case to the trial court under Tex. R. Civ. P. 263, filing an agreed statement of facts. Transamerica contended the commerce, due process, and equal protection clauses of the United States Constitution, and the due course of law, equal protection, and uniform tax clauses of the Texas Constitution, preclude the taxation of Transamerica's shipping containers. The trial court entered judgment for Transamerica, exempting its shipping containers from taxation for the tax year 1987. The District and the Board (jointly referred to as appellants) appeal the trial court's judgment, bringing six points of error.

The parties agreed, in part, to the following relevant facts:

---

1. Tax. Tax Code Ann. §§ 42.01 - 42.43 (Vernon 1982 & Supp. 1991).

(1) Transamerica is a corporation organized and existing under the law of the State of New York, with its principal place of business also in New York.

(2) The property at issue generally consists of shipping containers leased by Transamerica to various shipping companies for use in the shipment of goods throughout the world.

(3) The District included these shipping containers on its appraisal record of Transamerica as subject to property tax in Texas.

(4) Transamerica used the shipping containers exclusively in foreign commerce and the containers are instrumentalities of foreign commerce.

(5) The shipping containers are frequently present within the boundaries of the District.

(6) On January 1, 1987, the shipping containers were temporarily located within the District's boundaries.

(7) Because the containers are used to ship goods to many parts of the world, they could be subject to taxation in multiple countries, and are therefore at risk of international multiple taxation.

(8) Neither Transamerica, nor appellants, provide any mechanism capable of ensuring that the containers would not be subject to international multiple taxation.

(9) Neither Transamerica, nor appellants, could state with certainty which shipping containers, if any, had actually been taxed by other countries, because the containers were leased out to other companies that were responsible for paying such taxes.

(10) The shipping containers have a substantial nexus with the State of Texas and the tax levied was fairly apportioned.

(11) Similar containers owned by foreign domiciled taxpayers were intentionally and deliberately deleted from the tax rolls for tax year 1987 by the Board and/or the District.

(12) The deletion of such containers was pursuant to appellants' standard policy to delete similar containers owned by foreign domiciled taxpayers.

Appellants, in their first point of error, contend the trial court erred in holding the commerce clause of the United States Constitution precluded ad valorem taxation of Transamerica's shipping containers by Texas and its political subdivisions. The sufficiency of the evidence is not challenged by this point of error, or any other.

The Supreme Court of the United States decided in the case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 288 (1977) that, to be valid under the commerce clause of the United States Constitution, a tax on property used in interstate commerce must meet four requirements: (1) the tax must be applied to an activity that has a substantial nexus with the taxing state; (2) the tax must be fairly apportioned to activities carried on by the taxpayer in

the state; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to services provided by the State. *Id.*

The case of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-48, 452 (1979), adds additional considerations to the *Complete Auto* four-part test. When the state seeks to tax instrumentalities of foreign commerce, a more extensive constitutional inquiry is necessary, and two additional requirements must be met: (1) The tax, notwithstanding apportionment, must not create an enhanced risk of international multiple taxation; and (2) the tax must not prevent the federal government from speaking with one voice when regulating commercial relations with foreign governments. *Id.* Therefore, if the taxation of Transamerica's shipping containers fails any of the six requirements stated in *Complete Auto* and *Japan Line*, the tax is precluded under the commerce clause of the United States Constitution.

The Japan Line Test

Transamerica does not challenge the tax under the second requirement of the *Japan Line* test: that the taxation of its containers by political subdivisions of Texas prevented the federal government from speaking with one voice in its relations with foreign countries. A tax on domestically-owned property, such as the shipping containers owned by Transamerica, does not create the type of problems that concerned the court in *Japan Line*. *Japan Line* involved the taxation by the state of California of cargo containers owned by six Japanese shipping companies. *Japan Line, Ltd.*, 441 U.S. at 435. The companies were incorporated under the laws of Japan, and had their principal places of business and commercial domiciles in Japan. *Id.*

The litigants here agreed the containers were at risk of international multiple taxation. Therefore, the parties placed in issue whether the taxation of Transamerica's containers met the first requirement of the *Japan Line* text. The ultimate question presented is: Did the tax, notwithstanding apportionment, create a substantial or enhanced risk of international multiple taxation?

The trial court, in its conclusion of law six, set forth the *Japan Line* test, that the tax "must not create a substantial risk of international multiple taxation." It then concluded in conclusion of law eight that the tax creates "a risk of international multiple taxation, and thus fails to satisfy the requirements of *Japan Line*."

Appellants argue that, under *Japan Line*, there must be more than a mere risk of multiple taxation, rather the risk must be actual, or at the very least substantial. Their argument is centered around the trial court's failure to include the word "substantial" in conclusion of law eight, when the court concluded the tax failed the *Japan Line* test. Appellants are assuming the court's language is to be understood as stating there was a "mere" risk of multiple taxation, rather than a "substantial" risk, and argue a mere risk of multiple taxation is insufficient to invalidate the tax at issue.

Whether a risk of multiple taxation is of such a magnitude in a given case so that it fails the *Japan Line* test is a question of fact. The trial court stated in its findings of fact the containers were "at risk of international multiple taxation." The trial court did not use the word "substantial" in its findings of fact. We are unable to read into the literal language of the findings either the word "mere" or the word "substantial."

However, by setting forth the *Japan Line* test correctly, and then concluding the tax in question failed to satisfy the test, we imply from the context of the conclusions of law, the trial court determined any ultimate question posed by the evidence regarding the degree of risk adversely to the Board and the District. There is no specific finding of fact on whether the degree of risk of multiple international taxation was substantial or otherwise. When one or more elements of a ground of recovery or defense have been found by the trial court, and "omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment." Tex. R. Civ. P. 299.

Here, the trial court expressly found there existed a risk of multiple international taxation. However, the court omitted the element of substantial risk. We find no request from appellant for additional findings of fact directed to this specific subject pursuant to Tex. R. Civ. P. 298. The finding of "substantial" risk is essential to the conclusion of law found by the trial judge that the *Japan Line* test was violated. Thus, we hold the trial court by implication found a substantial or enhanced risk of multiple international taxation from his finding the *Japan Line* test had been met.

The next question to be answered under a rule 299 analysis is whether the presumed finding of fact is supported by the evidence. The parties agreed there existed a "risk of international multiple taxation." The record is silent on how the parties quantified the "risk" contained in the agreed statement of facts. The judge had before him additional agreed facts from which he could have concluded the risk of multiple taxation was "substantial," including, but not limited to the findings that other countries could tax the containers and that no system was in place to protect Transamerica from such an event.

Additionally, the case at hand falls within the class of instrumentalities that concerned the *Japan Line* court, i.e., those used in foreign commerce. 441 U.S. at 447-49. Transamerica could not tell with certainty which shipping containers, if any, had actually been taxed, because the containers were leased to shipping companies which were required by their respective leases to pay the taxes. Neither the District, the Board, not the state of Texas provided any mechanism capable of ensuring the containers would not be subjected to international multiple taxation for the tax year in question. We find the evidence before the trial court supports the implied finding of a "substantial" risk of multiple international taxation.

Finally, we hold the trial court's conclusion of law are correct as drawn from the facts. *Mercer v. Bludworth*, 715 S.W.2d 693, 697 (Tex. App.--Houston[1st Dist.] 1986, writ ref'd n.r.e.).

In light of the factual findings of substantial risk of international multiple taxation, the trial court's conclusion of law are correct in that the taxation plan of appellants does not withstand the *Japan Line* test. Thus, no discussion of the *Complete Auto* test is warranted or necessary. The trial court correctly concluded the taxation violates the commerce clause.

Point of error one is overruled.

Because the tax is unconstitutional under the commerce clause, the remaining points or error, which contend that the taxation is unconstitutional under the due process and equal protection clauses of the United States Constitution, and the due course of law, equal protection, and uniform tax clauses of the Texas Constitution, need not be addressed.

The judgment is affirmed.

/s/ Davie L. Wilson
Davie L. Wilson
Justice

Justices Cohen and Price[2] also sitting.

Publish. Tex. R. App. P. 90

Judgment rendered and opinion delivered SEP 26 1991
True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

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2. The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

Court of Appeals

First District of Texas

COPY OF JUDGMENT

HARRIS COUNTY APPRAISAL DISTRICT AND APPRAISAL REVIEW BOARD FOR THE HARRIS COUNTY APPRAISAL DISTRICT, APPELLANTS

Appeal from the 80th District Court of Harris County, Texas. (Tr.Ct. No. 89-12817). Opinion delivered by Justice Wilson, Justices Cohen and Price also sitting.

NO.01-90-00678-CV

V.

TRANSAMERICA CONTAINER LEASING INC., APPELLEE

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on June 4, 1990. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be in all things **affirmed.**

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Cohen, Wilson, and Price.

Judgment entered SEP 26 1991

NO. 89-12817

TRANSAMERICA CONTAINER LEASING INC.	§	IN THE DISTRICT COURT OF
Plaintiff	§	
VS.	§	HARRIS COUNTY, TEXAS
HARRIS COUNTY APPRAISAL DISTRICT, ET AL	§	80TH JUDICIAL DISTRICT
Defendants	§	

FINAL JUDGMENT

On the 18th day of May, 1990, came on to be heard the above-entitled and numbered cause which was an agreed case pursuant to Rule 263 of the Texas Rules of Civil Procedure. Transamerica Container Leasing Inc., the plaintiff, appeared by its attorney of record and announced ready for trial, and Harris County Appraisal District and Appraisal Review Board for Harris County Appraisal District, the Defendants, appeared by their attorney of record and announced ready for trial and no jury having been demanded, all matters in controversy were submitted to the Court.

The Court, after considering the pleadings, the Agreed Stipulation of Facts and the arguments and brief of counsel, is of the opinion that the ad valorem taxation by the State of Texas of Plaintiff's shipping containers (the "Property") described on the appraisal records of Defendant Harris

County Appraisal District ("Defendant Appraisal District") as property be corrected the appraisal roll and other appropriate appraisal records of Defendant Appraisal District, for the property tax year 1987 to reflect that for 1987 ad valorem tax purposes the total of the appraised value of the Property is $0.00 (zero), and (b) certify such corrections to the assessor for each taxing unit affected by such corrections.

It is further ORDERED, ADJUDGED, AND DECREED that all costs are assessed against the party incurring same, including attorney's fees.

It is further ORDERED, ADJUDGED, AND DECREED that the parties are DENIED all relief not expressly granted by this Final Judgment, whether the relief was requested or whether it could have been requested in this case.

All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

SIGNED this 4 day of June, 1990.

/s/ R. L. McKim
JUDGE PRESIDING

APPROVED AS TO FORM:

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ATTORNEYS FOR
DEFENDANTS

FILED
RAY HARDY DIST CLERK
HARRIS COUNTY TEXAS
JUN 6 11 52 AM '90
BY /s/ illegible
DEPUTY

NO. 89-12817

TRANSAMERICA CONTAINER LEASING	§	IN THE DISTRICT COURT OF
	§	
Plaintiff	§	
	§	
VS.	§	HARRIS COUNTY, TEXAS
	§	
HARRIS COUNTY APPRAISAL DISTRICT, ET AL	§	
	§	
	§	80th JUDICIAL
Defendants	§	DISTRICT

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The above-captioned cause came on for trial before the Court without a jury on the 18th day of May, 1990 as an agreed case pursuant to Rule 263 of the Texas Rules of Civil Procedure. All parties appeared through their attorneys of record. After considering the pleadings, the Agreed Stipulation of Facts and the arguments and brief from counsel, the Court makes its findings of fact and conclusions of law as follows:

FINDING OF FACT

1. Plaintiff is a corporation organized and existing under the laws of the State of New York and its principal place of business is located in such state.

2. The instant case is an ad valorem tax suit brought by Plaintiff pursuant to Chapter 42 of the Texas Property Tax Code challenging the inclusion of certain of its shipping containers (the "Property") on the Defendants' appraisal rolls for the tax year 1987. Plaintiff protested the inclusion of the Property on such appraisal rolls to Defendant, Harris County Appraisal Review Board, pursuant to Chapter 41 of the Texas Property Tax Code, on the ground that the Property is not subject to ad valorem taxation in Texas because the shipping containers are instrumentalities of foreign commerce and are used exclusively in foreign commerce, and their taxation by the State of Texas and its political subdivisions is, therefore, precluded by the Commerce and Due Process Clauses of the United States Constitution. Plaintiff also protested that the inclusion of the Property on Defendants' appraisal rolls violated the Equal Protection and Commerce Clauses of the United States Constitution and the Equal and Uniform Clause of the Texas Constitution because similar property owned by foreign domiciled taxpayers was intentionally and deliberately deleted from the tax rolls for tax year 1987 and was therefore not subjected to ad valorem tax for 1987. Plaintiff admits that taxation of the Property for the year 1987 is in all respects valid except to the extent that its taxation may be precluded by the Commerce, Due Process and Equal Protection Clauses of the United States Constitution and the Due Course of Law and Equal and Uniform Clauses of the Texas Constitution.

3. The Property at issue consists of shipping containers described on the appraisal records of the Defendant, Harris County Appraisal District, as property tax account number 0392374. These shipping containers are used exclusively in foreign commerce. On January 1, 1987, the shipping containers were temporarily located within the boundaries of Harris County Appraisal District, although shipping containers owned by Plaintiff are frequently present within the boundaries of the Harris County Appraisal District.

4. Plaintiff leases shipping containers to various shipping companies which use these containers to ship goods all over the world. These containers could be subjected to taxation in a number of these countries. Thus, these containers are at risk of international multiple taxation.

5. Neither Defendants nor the State of Texas provide any mechanism capable of ensuring that the Property would not be subjected to international multiple taxation for the tax year 1987. Plaintiff cannot tell with certainty which shipping containers, if any, have actually been taxed because the containers are leased to shipping companies, and these shipping companies are responsible for the payment of taxes and information regarding such payments are not provided to Plaintiff. Plaintiff does not contend, therefore, that any other country has taxed these shipping containers.

6. Plaintiff does not contend (i) that the shipping containers do not have a substantial nexus with the State of Texas, or (ii) that the tax is not fairly apportioned.

7. Similar property owned by foreign domiciled taxpayers was intentionally and deliberately deleted from the tax rolls for tax year 1987 by the Defendants.

8. The deletion of such property was pursuant to the Defendants' standard policy to delete similar property owned by foreign domiciled taxpayers.

CONCLUSIONS OF LAW

1. Plaintiff has complied with all prerequisites for filing and maintaining the instant lawsuit and this Court has jurisdiction to hear and decide this case pursuant to Texas Tax Code (the "Code") Section 42.21.

2. Shipping containers are instrumentalities of foreign commerce. 19 C.F.R. § 10.41(a)(3). *See also Japan Line. Led. v. County of Los Angeles*, 441 U.S. 434, 446 (1979).

3. A state tax on property engaged or used in foreign or interstate commerce must satisfy the dictates of the "commerce clause" of the United States Constitution which provides that:

> [The Congress shall have Power] to regulate commerce with foreign nations and among the several states, and with the Indian tribes.

U.S. CONST. art. I., § 8, cl. 3.

4. The ad valorem taxation by the State of Texas and its political subdivisions of domestically owned shipping containers that are used *exclusively* in foreign commerce violates the Commerce Clause of the United States Constitution.

5. According to the Supreme Court of the United States, in order to be valid under the commerce clause of the United States Constitution, a tax on property used in

interstate commerce must meet four requirements. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). First, the tax must be applied to an activity that has a substantial nexus with the taxing state. Second, the tax must be fairly apportioned to activities carried on by the taxpayer in the state. Third, the tax must not discriminate against interstate commerce. Fourth, the tax must be fairly related to services provided by the state.

6. In addition to the four part test of *Complete Auto*, when the state seeks to tax instrumentalities of foreign commerce, the two requirements added by the Supreme Court in *Japan Line, Ltd. v. County of Los Angeles*, must be met: (1) the tax, notwithstanding apportionment, must not create a substantial risk of international multiple taxation; and (2) the tax must not prevent the federal government from speaking with one voice when regulating commercial relations with foreign governments. 441 U.S. 434 (1979).

7. Since shipping containers are instrumentalities of foreign commerce as a matter of law, the additional items outlined by the Supreme Court in *Japan Line* must be considered. 19 C.F.R. § 10.41a(a)(3). See also *Japan Line*, 441 U.S. at 446.

8. The taxation of domestically owned shipping containers used exclusively in foreign commerce creates a risk of international multiple taxation and thus fails to satisfy the requirements of *Japan Line*.

9. If a State follows the holding of the *Japan Line* Court and excludes foreign-owned shipping containers used exclusively in foreign commerce from taxation, but it taxes domestically owned shipping containers used exclusively in foreign commerce, it gives an unfair "advantage' to the foreign-owned containers. The Equal

Protection Clause of the United States Constitution dictates that the domestically owned shipping containers must, therefore, also be excluded from taxation.

10. The concerns which faced the *Japan Line* Court are present regardless of whether the property being taxed is owned by a United States corporation or a foreign corporation, so long as the property is used in foreign commerce and is subject to a risk of taxation by a foreign sovereign.

11. The *risk* of multiple taxation, not merely multiple taxation in fact, may impose an unconstitutional burden under the commerce clause. *Japan Line*, 441 U.S. at 452 n.17; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 444; *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 202, 28-29.

12. In addition to failing to satisfy the requirements of *Japan Line*, the ad valorem taxation of these domestically owned shipping containers that are used exclusively in foreign commerce fails to satisfy the requirements of *Complete Auto*.

13. The tax imposed on Plaintiff's shipping containers is not fairly related to the services provided to Plaintiff by the State of Texas, since Plaintiff's shipping containers were only temporarily located within the boundaries of Harris County Appraisal District, and the value of any benefits Plaintiff may have received from the State during these containers' temporary presence within the State is minimal and does not bear a reasonable relationship to the amount of the tax imposed.

14. The tax imposed on Plaintiff's shipping containers discriminates against domestically domiciled taxpayers, unduly burdens commerce, and violates the Commerce Clause of the United States Constitution.

15. A tax may violate the commerce clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce. *Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S.Ct. 1617, 1622 (1989). See also, Smith, *State Discriminations Against Interstate Commerce*, 74 Calif. L. Rev., 1203, 1239 (1986).

16. Defendant's policy of deleting shipping containers used in foreign commerce from the tax rolls if those containers are owned by foreign domiciled taxpayers, while refusing to delete such containers from the tax rolls when they are owned by domestically domiciled taxpayers, favors foreign corporations at the expense of domestic corporations, thus creating an unfair competitive advantage for foreign corporations and unduly burdening and discriminating against interstate commerce.

17. The Defendants' policy interferes with the principal policy concerns served by the commerce clause, namely the promotion of trade, free from interference by the States. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 170 (1954). See also *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318 (1977).

18. If the State of Texas were allowed to impose such a tax, and so was every other country, the cumulative consequences of such a regime could impose a crippling

financial burden on the domestic corporations which own such shipping containers, thus unduly burdening commerce. *See, American Trucking Association v. Scheiner*, 483 U.S.266, 197 S.Ct. 2829, 2840 (1987).

19. The ad valorem taxation by the State of Texas and its political subdivisions of domestically owned shipping containers that are used exclusively in foreign commerce violates the Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Texas Constitution.

20. Article 1, Section 19 of the Texas Constitution, com.nonly referred to as the due course of law clause, has been held to correspond to the due process guarantee of the Fourteenth Amendment to the United States Constitution. *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 253 (Tex. 1887). See also *Lively v. Missouri, K. & T. Ry. Co. of Texas*, 120 S.W. 852 (Tex. 1909); *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983); *Spelling v. State*, 719 S.W.2d 404 (Tex. App. -- Fort Worth 1986); *Massachusetts Indemnity and Life Insurance Co. v. Texas State Board of Insurance*, 685 S.W.2d 104, 114 (Tex App. -- Austin 1985).

21. The due process clause places two restrictions on state taxation of interstate business activities and property. First, there must be "some minimal connection between those activities and the taxing State." *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978). Second, the tax must have a rational relationship to opportunities, benefits, or protection conferred or afforded by the taxing authority. See *Standard Pressed Steel Co. v. Dept. of Revenue*, 419 U.S. 560 (1975); *Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 N.5 (1968); *General Motors Corp. v. Washington*, 377 U.S. 436, 441 (1964).

22. The tax as imposed on Plaintiff's shipping containers for their full appraised value does not have a rational relationship to the services provided to Plaintiff by the State of Texas since Plaintiff's shipping containers were only temporarily located within the boundaries of Harris County Appraisal District and the value of any benefits Plaintiff may have received from the State during these containers' temporary presence within the State is minimal. The tax was imposed on the full value of these containers just as it was imposed on the full value of personal property of other taxpayers that was permanently located within the State of Texas, even though Plaintiff's shipping containers were only temporarily located within Harris County Appraisal District.

23. The intentional deletion of similar property owned by foreign domiciled taxpayers violates the Equal Protection Clause of the United States Constitution and the Equal and Uniform Clause of the Texas Constitution.

24. The equal protection clause of the United States Constitution is found in the Fourteenth Amendment, Section 1 and provides that, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Texas Constitution, Article 1, Section 3 similarly provides that, "all free men . . . have equal rights." Article VIII, Section 1 of the Texas Constitution provides that "[t]axation shall be equal and uniform."

25. The equal protection clause of the United States Constitution and the equal protection and equal and uniform clauses of the Texas Constitution are substantially similar provisions. *Hurt v. Cooper*, 130 Tex. 433, 110 S.W.2d 896 (Tex. 1937); *Twiford v. Nueces County Appraisal District*, 725 S.W.2d 325, 228 (Tex. App -- Corpus Christi 1987, writ ref'd n.r.e.); *Grayson County*

State Bank v. Calvert,357 S.W.2d 160 (Tex. Civ. App. -- Austin 1962), writ ref'd n.r.e.,); *American Transfer and Storage Co. v. Bullock*, 525 S.W.2d 918 (Tex. Civ. App. -- Austin 1975).

26. The purpose of the equal protection clause of the Fourteenth Amendment of the United States Constitution is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination. *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350 (1918). The equal protection clause protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. *Hillsborough v. Cromwell*, 326 U.S. 620 (1946).

27. In the laying of their taxes, states "must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1958). The rule often has been stated that a classification, in order to be constitutional, must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Id.* (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Louisville Gas & Electric Co. v. Coleman*,

277 U.S. 32,37; *AirWay Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160).

28. Defendants have admitted that pursuant to their standard policy, they intentionally and deliberately deleted from the tax rolls similar property owned by foreign-domiciled taxpayers. Clearly, Plaintiff has been subjected to a tax that was not imposed on other taxpayers engaged in the business of leasing shipping containers that are used in foreign commerce. This classification of the Plaintiff's Property by the Defendants does not rest upon a difference having a fair and substantial relation to the object of the legislation. This classification is without a rational basis, is clearly discriminatory, and accordingly violates the equal protection rights of Plaintiff as guaranteed by the United States Constitution. Further, such taxation and classification of property violates the Texas Constitution which requires that all real and tangible personal property must be taxed in proportion to its value in an equal and uniform manner. TEX. CONST. art. VIII, § 1.

/s/ Signed this 4th day of June 1990.

/s/ R. L. McKim
R. L. McKim Judge Presiding

In The
Court of Appeals
For The
First District of Texas

NO. 01-90-00678-CV

HARRIS COUNTY APPRAISAL DISTRICT AND APPRAISAL REVIEW BOARD FOR THE HARRIS COUNTY APPRAISAL DISTRICT, Appellant

V.

TRANSAMERICA CONTAINER LEASING, INC., Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 89-12817

ORDER

On this day came on to be heard appellants' motion for rehearing. And such motion is hereby **OVERRULED**.

PER CURIAM

Panel: Justices Cohen, Wilson and Price
Order entered January 9, 1992
Kathryn Cox, Clerk of the Court

NO.01-90-0678-CV

IN THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS
AT HOUSTON

HARRIS COUNTY APPRAISAL DISTRICT AND
APPRAISAL REVIEW BOARD FOR THE
HARRIS COUNTY APPRAISAL DISTRICT,

Appellants,

VS.

TRANSAMERICA CONTAINER LEASING, INC.,

Appellee.

APPEALED FROM THE 80TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS

APPELLANTS' MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Now come Appellants, Harris County Appraisal District and Appraisal Review Board for the Harris County Appraisal District, and file this Motion for Rehearing from this Court's Judgement and Opinion of September 26, 1991 affirming the trial court's judgment in this cause.

• • • • • •

Point of error Six

The Court of Appeals erred in holding that taxation of Transamerica's shipping containers violates the Commerce Clause of the united States Constitution. (Germane to Op. 6).

Point of Error Seven

The Court of Appeals erred by not sustaining Appellants' Point of Error One and thereby failing to reverse the trial court's judgment because the Commerce Clause does not preclude taxation of Transamerica's shipping containers by the State of Texas and its political subdivisions. (Germane to Op. 6).

• • • • • •

IN THE SUPREME COURT OF TEXAS

-- -- -- --

NO. D-2049,	)	June 24, 1992
	)	
HARRIS COUNTY	)	
APPRAISAL DISTRICT	)	
AND APPRAISAL REVIEW	)	
BOARD FOR THE HARRIS	)	
COUNTY APPRAISAL	)	
DISTRICT	)	
	)	From
v.	)	HARRIS COUNTY,
	)	1st District
TRANSAMERICA CONTAINER	)	
LEASING, INC.	)	

Application of petitioners for writ of error to the Court of Appeals for the First District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicants, Harris County Appraisal District and Appraisal Review Board for the Harris County Appraisal District, pay all costs incurred on this application.

****

NO.D-2049

IN THE
SUPREME COURT OF TEXAS

HARRIS COUNTY APPRAISAL DISTRICT AND
APPRAISAL REVIEW BOARD FOR THE
HARRIS COUNTY APPRAISAL DISTRICT

Petitioners,

V.

TRANSAMERICA CONTAINER LEASING INC.,

Respondent.

PETITIONERS' APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

Petitioners, Harris County Appraisal District and Appraisal Review Board for the Harris County Appraisal District, file this Application for Writ of Error from the judgment and opinion of the First Court of Appeals in Cause No. 01-90-00678-CV, styled *Harris County Appraisal District and Appraisal Review Board for Harris County Appraisal District v. Transamerica Container Leasing Inc.*

Point of Error Two

The court of appeals erred in holding that taxation of Transamerica's shipping containers violated the Commerce Clause of the United States Constitution.

(Germane to Op. 6; Petitioners' Motion for Rehearing Point of Error Six.)

Point of Error Three

The court of appeals erred by not sustaining Petitioners' Point of Error One and thereby failing to reverse the trial court's judgment because the Commerce Clause does not preclude taxation of Transamerica's shipping containers by the State of Texas and its political subdivisions.

(Germane to Op. 6; Petitioners' Motion for Rehearing Point of Error Seven.)

****

NO. D-2049,	)	
	)	
HARRIS COUNTY	)	September 9, 1992
APPRAISAL DISTRICT	)	
AND APPRAISAL	)	
REVIEW BOARD FOR	)	
THE HARRIS COUNTY	)	
APPRAISAL DISTRICT	)	
	)	
v.	)	From HARRIS County,
	)	1st District.
TRANSAMERICA	)	
CONTAINER LEASING,	)	
INC.		

Petitioners' Motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

****

NO. D-2049

IN THE

SUPREME COURT OF TEXAS

HARRIS COUNTY APPRAISAL DISTRICT AND
APPRAISAL REVIEW BOARD FOR THE
HARRIS COUNTY APPRAISAL DISTRICT,

Petitioners,

V.

TRANSAMERICA CONTAINER LEASING INC.,

Respondent.

PETITIONERS' MOTION FOR REHEARING

TO THE SUPREME COURT OF TEXAS:

Petitioners, Harris County Appraisal District and Appraisal Review Board for the Harris County Appraisal District, file this Motion for Rehearing of their Application for Writ of Error from the judgment and opinion of the First Court of Appeals in Cause No. 01-90-00678-CV, styled *Harris County Appraisal District and Appraisal Review*

Board for Harris County Appraisal District v. Transamerica Container Leasing, Inc. This Court denied Petitioners' Application for Writ of Error on June 24, 1992.

• • • • • •

Point of Error Two

The court of appeals erred in holding that taxation of Transamerica's shipping containers violated the Commerce Clause of the United States Constitution.

(Germane to Op. 6; Petitioners' Motion for Rehearing Point of Error Six).

Point of Error Three

The court of appeals erred by not sustaining Petitioners' Point of Error One and thereby failing to reverse the trial court's judgment because the Commerce Clause does not preclude taxation of Transamerica's shipping containers by the State of Texas and its political subdivisions.

(Germane to Op. 6; Petitioners' Motion for Rehearing Point of Error Seven).

****

NO. 89-12817

TRANSAMERICA CONTAINER LEASING INC.	§	IN THE DISTRICT COURT OF
	§	
Plaintiff	§	
	§	HARRIS COUNTY,
VS.	§	TEXAS
	§	
HARRIS COUNTY	§	
APPRAISAL DISTRICT, ET AL	§	80TH JUDICIAL
	§	DISTRICT
Defendants	§	

AGREED STIPULATION OF FACTS

Now come Plaintiff, Transamerica Container Leasing Inc. and Defendants, Harris County Appraisal District and Harris County Appraisal Review Board, and file this their Agreed Stipulation of Facts pursuant to Rule 263. Texas Rules of Civil Procedure, by which the above-named parties stipulate and agree that the following facts are true, correct, and established for all purposes relevant to the resolution of the instant case.

I.

Plaintiff is a corporation organized and existing under the laws of the State of New York and its principal place of business is located in such state.

II.

This instant case is an ad valorem tax suit brought by Plaintiff pursuant to Chapter 42 of the Texas Property Tax Code challenging the inclusion of certain of its shipping

containers (the "Property") on the Defendants' appraisal rolls for the tax year 1987. Plaintiff protested the inclusion of the Property on such appraisal rolls to defendant, Harris County Appraisal Review Board, pursuant to Chapter 41 of the Texas Property Tax Code, on the ground that the Property is not subject to ad valorem taxation in Texas because the shipping containers are instrumentalities of foreign commerce and are used exclusively in foreign commerce, and their taxation by the State of Texas and its political subdivisions is, therefore, precluded by the Commerce and Due Process Clauses of the United States Constitution and the Due Course of Law Clause of the Texas Constitution. Plaintiff also protested that the inclusion of the Property on Defendants' appraisal rolls violated the Equal Protection and Commerce Clauses of the United States Constitution and the Equal and Uniform Clause of the Texas Constitution because similar property owned by foreign domiciled taxpayers was intentionally and deliberately deleted from the tax rolls for tax year 1987 and was therefore not subjected to ad valorem tax for 1987. Plaintiff admits that taxation of the Property for the year 1987 in all respects valid except to the extent that its taxation may be precluded by the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution and the Due Course of Law and Equal and Uniform Clauses of the Texas Constitution.

III.

Plaintiff has complied with all prerequisites for filing and maintaining the instant law suit and this Court has jurisdiction to hear and decide this case.

IV.

The Property at issue generally consists of shipping containers described on the appraisal record of the Defendant, Harris County Appraisal District, as property tax account number 0392374.

V.

The Property consists of certain shipping containers that are used exclusively in foreign commerce and are instrumentalities of foreign commerce. On January 1, 1987, the shipping containers were temporarily located within the boundaries of Harris County Appraisal District, although shipping containers owned by Plaintiff are frequently present within the boundaries of Harris County Appraisal District.

VI.

Plaintiff leases shipping containers to various shipping companies which use these containers to ship goods all over the world. These containers could be subjected to taxation in a number of these countries. Thus, these containers are at risk of international multiple taxation.

VII.

Neither Defendants nor the State of Texas provide any mechanism capable of ensuring that the Property would not be subjected to international multiple taxation for the tax year 1987. Plaintiff cannot tell with certainty which shipping containers, if any, have actually been taxed because the containers are leased to shipping companies, and these shipping companies are responsible for the payment of taxes

and information regarding such payments is not provided to Plaintiff. Plaintiff does not contend, therefore, that any other country has taxed these shipping containers.

VIII.

Plaintiff does not contend (i) that the shipping containers do not have a substantial nexus with the State of Texas, or (ii) that the tax is not fairly apportioned.

IX.

Similar property owned by foreign domiciled taxpayers was intentionally and deliberately deleted from the tax rolls for tax year 1987 by the Defendants.

X.

The deletion of such property was pursuant to the Defendants' standard policy to delete similar property owned by foreign domiciled taxpayers.

Respectfully submitted,

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By /s/ Jasper G. Taylor III
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By /s/ Kenneth Wall
Kenneth Wall
State Bar No. 20759000

ATTORNEYS FOR DEFENDANTS

Signed and certified as correct this 18 day of May, 1990.

/s/ R. L. McKim
Judge Presiding

R. L. McKim

Supreme Court, U.S.
FILED
JAN 6 1993
OFFICE OF THE CLERK

No. 92-973

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HARRIS COUNTY APPRAISAL DISTRICT, *et al.*,
Petitioners,

v.

TRANSAMERICA LEASING INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

---

BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Commerce Clause precludes a local Texas taxing authority from imposing an ad valorem property tax on domestically owned shipping containers used exclusively in foreign commerce, when the imposition of such property tax would create a substantial risk of international multiple taxation.*

---

* Respondent Transamerica Leasing Inc., an indirect wholly owned subsidiary of Transamerica Corporation, is the corporate successor to Transamerica Container Leasing Inc. and has no nonwholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-973

HARRIS COUNTY APPRAISAL DISTRICT, *et al.*,
Petitioners,

v.

TRANSAMERICA LEASING INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. *Background.* Respondent Transamerica Leasing Inc. ("Transamerica") brought this suit in the 80th Judicial District Court of Harris County, Texas, challenging the inclusion of certain of its shipping containers on petitioners' ad valorem tax appraisal rolls for 1987. Pet. App. 34a-35a. Transamerica is a corporation organized under the laws of Delaware and has its principal place of business in New York. *Id.* at 34a (the parties' stipulation incorrectly identifies New York as the state of incorporation). The shipping containers are instrumentalities of foreign commerce and are used exclusively

in such commerce. *Id.* at 36a. The containers were temporarily located in Texas on January 1, 1987, the relevant date for ad valorem property taxation under local law. *Id.* Petitioners are local Texas taxing authorities.

2. *Litigation in the district court.* The district court found that Transamerica's shipping containers are used to ship goods all over the world, that the containers can be subject to property taxation abroad, and that Texas law provides no relief from or protection against international multiple taxation. *Id.* at 16a. The court also found that although petitioners sought to tax Transamerica's containers, they did not tax similar containers owned by foreign domiciliaries. *Id.*

The district court concluded that petitioners' ad valorem taxation of Transamerica's shipping containers is barred by both the United States and Texas Constitutions. The court began its analysis with the Commerce Clause, art. I, § 8, cl. 3, of the United States Constitution.

The district court noted that, to be valid, state taxation of property used exclusively in foreign commerce must satisfy the requirements of both *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). Pet. App. 17a-18a. The court held that petitioners' tax on Transamerica's containers did not meet the test established by either case.

As to *Complete Auto*, the court held that the tax is not fairly related to services provided by the state: Transamerica's "shipping containers were only temporarily located within the boundaries of Harris County Appraisal District, and the value of any benefits [Transamerica] may have received from the State during these containers' temporary presence within the State is minimal and does not bear a reasonable relationship to the amount of tax imposed." *Id.* at 19a. The court further held that petitioners' "policy of deleting shipping containers used

in foreign commerce from the tax rolls if those containers are owned by foreign domiciled taxpayers, while refusing to delete such containers from the tax rolls when they are owned by domestically domiciled taxpayers, favors foreign corporations at the expense of domestic corporations, thus creating an unfair competitive advantage for foreign corporations and unduly burdening and discriminating against interstate commerce." *Id.* at 20a.

As to *Japan Line*, the district court concluded that petitioners' tax did not satisfy the requirement that "the tax, notwithstanding apportionment, must not create a substantial risk of international multiple taxation." *Id.* at 18a.

In addition, the district court held that the tax on Transamerica's containers also violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and the Due Course of Law, Equal Protection, and Equal and Uniform Clauses of the Texas Constitution. *Id.* at 21a-24a.

3. *Decision by the court of appeals.* The Court of Appeals for the First District of Texas affirmed. Because the court of appeals rested its decision on the *Japan Line* test, it determined that "no discussion of the *Complete Auto* test is warranted or necessary" and that the remaining federal and state constitutional issues "need not be addressed." *Id.* at 8a.

Petitioners' principal argument with respect to *Japan Line* was that the district court, although applying the correct test, had failed to state a finding that the risk of international multiple taxation was "substantial." The court of appeals rejected that argument, holding that under Tex.R.Civ.P. 298 and 299 such a finding was considered implicit in the district court's opinion read as a whole. *Id.* at 7a. The court further determined that this implicit finding of a substantial risk of multiple

international taxation was supported by the evidence: "[t]he judge had before him additional agreed facts from which he could have concluded the risk of multiple taxation was 'substantial,' including, but not limited to the findings that other countries could tax the containers and that no system was in place to protect Transamerica from such an event." *Id.* The court therefore agreed that "the taxation plan of [petitioners] does not withstand the *Japan Line* test." *Id.* at 8a.

The Texas Supreme Court denied petitioners' application for a writ of error, "having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals." *Id.* at 28a.

ARGUMENT

The decision of the Texas intermediate court of appeals in this case does not warrant review by this Court. The court of appeals faithfully followed Texas procedural law and this Court's decision in *Japan Line*; its ruling does not conflict with that of any state court of last resort or federal court of appeals; nor is there any other reason to grant review.

1. In *Japan Line*, this Court set forth the following test for determining the validity under the Commerce Clause of a tax on instrumentalities of foreign commerce:

> [A]n inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from "speaking with

> one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

441 U.S. at 451. The court of appeals faithfully applied this test. It struck down petitioners' ad valorem property tax on Transamerica's shipping containers because that tax creates a substantial risk of international multiple taxation. Pet. App. 5a-8a.

In *Japan Line*, as petitioners point out, Pet. 10, this Court had no occasion to apply the constitutional test announced therein to a tax, like petitioners', on domestically owned instrumentalities of foreign commerce. *See* 441 U.S. at 444 n.7. But that does not mean that this case implicates a completely different constitutional test. It means only that the *Japan Line* test must here be applied to different facts. That is what the lower courts in this case undertook to do. They understood that the crucial issue under *Japan Line* is not who owns the instrumentalities of foreign commerce that are being taxed but, rather, whether the tax creates a substantial risk of international multiple taxation. They determined that because petitioners' tax does create such a risk, it violates the Commerce Clause. Pet. App. 7a-8a; *id.* at 18a. That result is wholly consistent with *Japan Line*.

Petitioners appear to take issue with the finding that their tax poses a substantial risk of international multiple taxation, suggesting that there is only a "mere risk" and complaining that "there is no contention or finding that any other country taxes Transamerica's shipping containers." Pet. 10-11. But the adverse finding of substantial risk, which is supported by the record and rooted in Texas procedural law, *see* Pet. App. 6a-8a, is not subject to review or correction here.

In any event, petitioners have stipulated that Transamerica's containers can "be subjected to taxation in a number of . . . countries," that "these containers are at risk of international multiple taxation," and that there

is no "mechanism capable of ensuring that the [containers] would not be subject to international multiple taxation." *Id.* at 36a. This stipulation, which petitioners cannot here challenge, has ample basis. Transamerica leases its containers to shipping companies that transport them worldwide; during the course of their movements, these containers may be subject to tax either where those lessees are domicilaries or elsewhere. *See id.* at 36a-37a. Indeed, because the containers are leased to third parties rather than used by Transamerica, the "international custom under which the country of domicile may tax the full value of property located abroad," Pet. 11, actually increases the likelihood of burdensome multiple taxation. The substantial risk of international multiple taxation is manifest.

Like *Japan Line*, "[t]his case concerns foreign commerce. Even a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Japan Line*, 441 U.S. at 456. Petitioners nonetheless suggest that in the wake of *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983), such multiple international taxation no longer can be considered a matter of constitutional concern. *See* Pet. 11. But this Court took care to explain in *Container Corp.* that that case "involve[d] a tax on income rather than a tax on property" and that " '[t]he reasons for allocation to a single situs that often apply in the case of property taxation carry little force' in the case of income taxation." 463 U.S. at 188, quoting *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 445 (1980). The *Japan Line* test plainly retains its vitality in cases of property taxation, and petitioners' tax does not pass that test.

2. There is no conflict or any other reason why this Court should grant review of this case. Petitioners' principal claim, that the question presented "is important to the State of Texas and its local governmental units,"

Pet. 12, is refuted by the fact that the Texas Supreme Court itself denied review and, in doing so, specifically noted that the case presents no question of "importance to the jurisprudence of the State." Pet. App. 28a.

Nor is there any reason to accept petitioners' suggestion that the issue is important to other states. Petitioners furnish no evidence that this issue is being litigated elsewhere or even that any other state attempts to impose ad valorem property taxes on shipping containers or other instrumentalities of foreign commerce; certainly there is no evidence that any other state imposes such a tax without affording relief from or protection against multiple international taxation. Although petitioners insinuate that domestic owners of instrumentalities of foreign commerce "are likely to continue their challenges to similar taxes," Pet. 12, petitioners do not identify, and we are not aware of, any such challenges. This litigation appears to be unique. But, even if the issue were being widely litigated, which it is not, this case, with its observably skimpy record, would be an unsuitable vehicle for resolution of the issue on a nationwide basis. Furthermore, the issue itself is not ultimately dispositive even of this lawsuit: were review to be granted and petitioners to prevail, other issues of federal and Texas law, which the district court resolved in Transamerica's favor, *see* Pet. App. 21a-24a, would remain for consideration by the court of appeals. *See id.* at 8a.

Finally, we agree with petitioners that "[b]ecause of the differences between sales and property taxes," Pet. 11, this case will not be governed by this Court's forthcoming decision in *ITEL Containers International Corp. v. Cardwell*, 814 S.W.2d 29 (Tenn. 1991), *cert. granted*, 112 S.Ct. 1158 (1992) (No. 91-321). In *ITEL*, the Tennessee Supreme Court upheld a Tennessee "sales tax upon the transfer of possession in Tennessee of domestically-owned cargo containers used exclusively in international commerce." *Id.* at 30. The court reasoned that such a tax is like the taxes upheld in *Wardair Canada, Inc. v.*

Florida Dep't of Revenue, 477 U.S. 1 (1986), and *Department of Revenue v. Association of Washington Stevedoring Co.*, 435 U.S. 734 (1978), and, correspondingly, is unlike the tax struck down in *Japan Line*:

> Tennesee's sales tax on the transfer of possession of containers used to move goods in foreign commerce is more analogous to a sales tax on fuel used to move passengers in foreign commerce, and to an occupation tax on the activity of loading and unloading cargo in foreign commerce, than to the direct *ad valorem* property tax imposed by California on Japan Line's cargo containers.

ITEL, 814 S.W.2d at 35. It makes no difference here whether this Court agrees or disagrees with that conclusion, for this case, unlike *ITEL*, indisputably does involve precisely the same kind of *ad valorem* property tax as *Japan Line*. The validity of petitioners' tax therefore is to be determined, as the courts below properly held, in accordance with the *Japan Line* test. The lower courts correctly applied that test in this case, and there is no cause for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
MAR 1 1993
OFFICE OF THE CLERK

No. 92-973

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HARRIS COUNTY APPRAISAL DISTRICT, *et al.*,
Petitioners,

v.

TRANSAMERICA LEASING INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

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RESPONDENT'S SUPPLEMENTAL MEMORANDUM

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UNITED STATES CONSTITUTION:

Foreign Commerce Clause, art. I, § 8, cl. 3 1

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RESPONDENT'S SUPPLEMENTAL MEMORANDUM

This case, like *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), involves imposition of a state ad valorem property tax on shipping containers used exclusively in foreign commerce. The courts below, carefully applying the test set forth in *Japan Line*, held that petitioners' tax on respondent Transamerica's shipping containers is invalid under the foreign commerce clause, art. I, § 8, cl. 3 of the United States Constitution, because it creates a substantial risk of international multiple taxation. Pet. App. 8a.

Petitioners argue that the courts below erred in following *Japan Line* because the shipping containers here are owned by a domestic rather than, as there, a foreign corporation. But this Court's intervening decision in *Itel Containers International Corp. v. Huddleston*, No. 91-321 (February 23, 1993), involving the validity of a sales tax on rentals received by a domestic lessor of shipping con-

tainers, belies petitioners' contention that the nationality of the taxpayer alters the nature of the inquiry under the foreign commerce clause. The courts below did not err in adhering to the *Japan Line* test.

1. In *Itel Containers*, this Court began its analysis of the question presented under the foreign commerce clause by explicitly reaffirming what it had said in *Japan Line*: a state tax on instrumentalities of foreign commerce not only must satisfy the requirements of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), but also (i) must avoid creating a substantial risk of international multiple taxation and (ii) should not interfere with the federal government's ability to speak with one voice when regulating commercial relations with foreign governments. *Itel Containers*, slip op. 10-11, citing *Japan Line*, 441 U.S. at 451. The Court thus confirmed the applicability of the *Japan Line* test to cases, such as this, involving taxes on domestically owned instrumentalities of foreign commerce. The lower courts in this case, in other words, applied the correct constitutional test.

2. The Court then addressed the *Complete Auto* test, which looks to whether the challenged state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 12, quoting *Complete Auto*, 430 U.S. at 279. The taxpayer in *Itel Containers* conceded that the Tennessee tax there at issue met that test. *Id.* That "confirm[ed] both the State's legitimate interest in taxing the transaction and the absence of an attempt to interfere with the free flow of commerce, be it foreign or domestic." *Id.* at 13.

This case is completely different. The trial court expressly held that petitioners' ad valorem property tax does not meet the *Complete Auto* test, *see* Pet. App. 19a, and the court of appeals did not disturb that holding. *See id.* at 8a. The state courts themselves thus have rejected pe-

titioners' claim to have a legitimate local interest in taxing Transamerica's shipping containers. This consideration alone undercuts petitioners' suggestion that this case is "similar" to *Itel Containers*. *See* Pet. 11.

3. The Court in *Itel Containers* then proceeded to determine whether the sales tax there at issue "create[s] the substantial risk of international multiple taxation that implicates foreign commerce clause concerns." *Itel Containers*, slip op. 14. In concluding that the tax did not pose such a risk, the Court relied upon two considerations, neither of which is present in this case.

First, the Court reasoned that because the payment of lease rentals is "a discrete transaction occurring within the State," *id.* at 13, a sales tax on such rentals poses little practical risk of multiple taxation. *See also Wardair Canada Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 9 (1986) ("there is no threat of multiple international taxation in this case, since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs within one national jurisdiction only"). The situation is very different with respect to ad valorem property taxes like those at issue here and in *Japan Line*. Such taxes are levied in full on migratory instrumentalities of foreign commerce that have only a temporary and fleeting connection with the taxing jurisdiction. This poses a manifest risk of multiple international taxation as the subject containers move around the world.

Second, the Court noted that "Tennessee credits against its own tax any tax properly paid in another jurisdiction, foreign or domestic, on the same transaction," a measure that "reduces, if not eliminates, the risk of multiple international taxation." *Itel Containers*, slip op. 14. In contrast, neither petitioners nor the State of Texas provide any similar credit or other like protection against that risk. *See* Pet. 5; Pet. App. 8a, 36a.

4. In the end, the Court in *Itel Containers* left the relevant foreign commerce clause analysis unchanged. Al-

though a state may, within certain limits, tax a transaction that is also potentially subject to taxation by a foreign sovereign, *see Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 193 (1983), it may not "create[] a substantial risk of international multiple taxation." *Japan Line*, 441 U.S. at 451. As petitioners concede, the constitutional analysis at bottom calls for a judgment concerning, essentially as a factual matter, which side of the line a case falls on. *See* Pet. 8. The courts below properly exercised their judgment on this issue, and nothing in *Itel Containers* calls that judgment into question.

In conclusion, this Court's intervening decision in *Itel Containers* affords no basis for disturbing the ruling below. For the reasons stated here and in the brief in opposition, the petition for a writ of certiorari should be denied.

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